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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHU TRUONG, **Plaintiff and Appellant,** **v.** **MERCY MEDICAL CENTER OF REDDING,** **Defendant and Respondent.**	**A122810** **(San Francisco County Super. Ct. No. 450867)**

Chu Truong (Truong) appeals from a judgment entered in favor of respondent Mercy Medical Center of Redding (Mercy Medical) on her claim for wrongful termination in violation of public policy. Truong contends that the special verdict form was erroneous because it contained an inappropriate question for the jury. We will affirm the judgment.

I. *FACTS AND PROCEDURAL BACKGROUND*

Beginning in August 2004, Mercy Medical employed Truong as a Certified Clinical Laboratory Scientist II in its blood bank. From almost the outset of her employment, Truong purportedly had difficulties dealing with her coworkers.[1] She was counseled and disciplined on numerous occasions for, among other things: gossiping in

[1] The reporter's transcript of the trial is not included in the record on appeal. Our summary of the facts underlying this case is necessarily based in part on Mercy Medical's description of the facts in its respondent's brief. The respondent's brief provides citations only to Mercy Medical's trial brief, which does not contain evidentiary citations.

the work place, failing to work collaboratively with her coworkers, erratic and abusive behavior resulting in a hostile environment for employees, excessive use of overtime, failing to provide training to coworkers, failing to submit quality assurance reports, and leaving the blood bank without notice to other employees.

Truong complained to Mercy Medical about certain purported safety violations in the blood bank. In November 2005, she reported those alleged violations in writing to the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) and the College of American Pathologists (CAP).

In February 2006, Mercy Medical placed Truong on a 90-day performance improvement plan, which listed a number of areas in which Truong had to show improvement or resolve ongoing problems. Truong failed to meet the plan's expectations and was terminated from her employment in June 2006.

A. *Truong's Complaint*

In February 2007, Truong sued Mercy Medical for wrongful termination. In her second amended complaint, she asserted a cause of action for wrongful termination in violation of public policy, contending she was terminated in retaliation for complaining about the purported safety violations and reporting those violations to JCAHO and CAP. She alleged that her complaints constituted activity protected under a number of statutes, including Labor Code section 1102.5 (precluding retaliation for reports to government or law enforcement) and Health and Safety Code section 1278.5 (precluding health facilities from retaliating against personnel for complaints). Truong also asserted causes of action for intentional infliction of emotional distress, fraud, concealment, misrepresentation under Labor Code section 970, and discrimination in violation of FEHA (California Fair Employment and Housing Act, Government Code section 12900 et seq.).

The matter proceeded to a jury trial. After Mercy Medical asserted motions for nonsuit, only Truong's claim for wrongful termination in violation of public policy was given to the jury for deliberation.

B. *Special Verdict Form and Judgment*

The jury was provided a special verdict form, which asked four questions. Question 1 inquired: "Were plaintiff's complaints or reports of alleged violations a motivating reason for defendant's decision to discharge plaintiff?" Question 2 asked: "Did defendant prove that the discharge would have occurred for legitimate, independent reasons had plaintiff not engaged in the activities in question number 1?" Questions 3 and 4, which the jury was directed not to answer if it responded "yes" to Question 2, pertained to whether Truong's discharge caused her harm and the amount of damages she suffered.

The jury answered Question 1 affirmatively, indicating that Truong's complaints were "a motivating reason" for Mercy Medical's discharging her. However, the jury also answered Question 2 affirmatively, indicating that Mercy Medical proved the discharge would have occurred for legitimate, independent reasons anyway. In accord with the verdict form's directions, the jury did not answer Question 3 or Question 4.

Based on the jury's findings, the court entered judgment in Mercy Medical's favor.

C. *Truong's New Trial Motion*

Truong moved for a new trial, arguing that the inclusion of Question 2 made the special verdict form legally incorrect and Truong was entitled to proceed to the damages phase of the trial because the jury found in her favor on Question 1. Specifically, Truong argued, the jury's finding that Mercy Medical had an illegal motivation for discharging her (Question 1) made it irrelevant whether there were any legitimate reasons for her discharge (Question 2). The trial court denied her motion.

Truong appealed from the judgment, but not from the order denying her new trial motion.

II. *DISCUSSION*

Truong contends the special verdict form was erroneous because Question 2 was unnecessary and pertained to a burden-shifting issue, which is not for a jury to decide. Mercy Medical disagrees and contends Truong is barred from challenging the special verdict form due to principles of invited error and waiver. We address these latter issues first.

A. *Invited Error and Waiver*

" 'The "doctrine of invited error" is an "application of the estoppel principle": "Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal" on appeal. [Citation.]' " (*Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1312.)

By Mercy Medical's account, after the court approved the jury instructions, the parties submitted proposed verdict forms and created the final version with input from the court. Truong's counsel did not object to the special verdict form or any of the questions therein. More particularly, Mercy Medical asserts: "[A]fter a discussion with the Court regarding the content of the verdict form, [Truong] agreed to the final form, which was given to the jury. This discussion and agreement was memorialized by counsel for both parties signing the back of the jury form, indicating their approval."

If Mercy Medical's depiction of the events is supported by the record, Truong cannot now challenge the verdict form. (See, e.g., *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 567 [jointly requested jury instruction could not be challenged on appeal due to invited error doctrine].) However, Mercy Medical supports its statements only with a citation to page 61 of the clerk's transcript, which is merely the filed copy of the special verdict form, lacking confirmation that the verdict form was explicitly approved by Truong's attorney. Truong readily points out this deficiency in Mercy Medical's citation, without saying whether her counsel did, in fact, approve the verdict form.

Notwithstanding Mercy Medical's inadequate citation, the record still demonstrates that Truong invited the purported error of which she now complains. In the

first place, Mercy Medical also asserted Truong's approval of the verdict form in opposing her new trial motion. Truong did not deny the accusation, which may be read as a tacit acknowledgement of her counsel's approval of the special verdict form.[2]

Moreover, whether or not Truong's counsel explicitly approved the verdict form *itself*, Truong certainly suggested that the jury should analyze her claims in the very manner described in the verdict form. The verdict form asked the jury (1) whether Truong's complaints were a motivating reason for her discharge and (2) whether Mercy Medical proved the discharge would have occurred for legitimate, independent reasons anyway. Truong's trial brief advised the court of the same analysis: ". . . [P]laintiff has also alleged her wrongful termination was in retaliation for refusing to violate the law and reporting defendants to a state agency in violation of Labor Code [section] 1102.5. Once plaintiff proves a violation of that statute by a preponderance of the evidence[,] *defendant have [sic] the burden to prove by clear and convincing evidence that the plaintiff still would have been terminated even of [sic] she did not engage in this protected conduct*." (Italics added.) Furthermore, a jury instruction that Truong purportedly prepared – and to which she lodged no objection in the trial court or in this appeal – has similar language, reading in part: "If plaintiff establishes by a preponderance of the evidence that plaintiff's disclosing information to Mercy Medical Center and/or CAP and/or JCAHO was a contributing factor in her termination, *defendant then has the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not reported defendant to Mercy Medical Center and/or CAP and/or JCAHO*." (Italics added.) Accordingly, if the inclusion of Question 2 in the special verdict form reflects an error of law, Truong espoused the error. [3]

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[2] At oral argument in this appeal, Truong's counsel acknowledged that he had approved the verdict form.

[3] Indeed, given these jury instructions, any harm that could have arisen from Question 2 in the special verdict form would have arisen from the jury instructions

In addition to the invited error doctrine, the doctrine of waiver or forfeiture also applies. When a special verdict form or its questions are ambiguous, an objection must be made in the trial court. Common sense dictates that the objection must ordinarily be made before the verdict form is submitted to the jury or, at the very latest, before the jury is discharged. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131; see *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2 [failure to object to the verdict before the jury is discharged is frequently held a waiver, unless the record indicates that the complaining party's silence was not motivated by any desire to reap technical advantage or litigious strategy].)[4] In addition, an attorney may have an obligation to clarify any perceived ambiguity in the verdict form during closing argument. (*Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318, 326.)

Here, Truong's attorney certainly knew of the verdict form before the jury was discharged, even if he did not prepare or approve it. (E.g., Cal. Rules of Court, rule 3.1580 [special verdict form must be served on all parties].) Truong made no objection to the verdict form until the new trial motion, after the jury was discharged. There is no indication from the appellate record why Truong and her counsel did not object to the verdict form before the jury was discharged, and there is thus no basis to conclude that it was due to a mere mistake and without hope of a tactical advantage, by

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anyway. Therefore, any error in including Question 2 in the verdict form would have to be deemed harmless.

[4] We note that the court in *All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1220 (*All-West*), stated: "Appellants have not waived the right to challenge the use of the verdict forms by failing to argue against them prior to their submission to the jury. They timely preserved the issue by raising it at their motion for new trial. (*Mixon v. Riverview Hospital* (1967) 254 Cal.App.2d 364, 376-377; *Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 758.)" In *All-West*, however, the appellant may have appealed from both the judgment and the order denying the motion for a new trial. (*Id.* at p. 1216.) Truong appealed only from the judgment. Furthermore, the cases on which *All-West* relied pertained not to a party's failure to object to a *question* on the verdict form, but to the parties' failure to seek clarification of the jury's *answers* – in other words, at issue was not the verdict form, but the verdict.

which she might reserve the possibility of a new trial or appeal if the jury decided against her.

Truong argues that the right to challenge an erroneous verdict form cannot be waived, based on Code of Civil Procedure section 647. Code of Civil Procedure section 647 provides that the "verdict of the jury" and "refusing to give an instruction or modifying an instruction" are "deemed excepted to." We question, however, whether a special verdict *form* is the actual "verdict of the jury" within the meaning of Code of Civil Procedure section 647 (particularly in light of the cases finding a waiver of challenges to verdict forms), and a special verdict form is certainly not a refusal to give or modify an instruction. The cases on which Truong relies in this regard involve the failure to object to erroneous jury instructions, not special verdict forms. (E.g., *Pipoly v. Benson* (1942) 20 Cal.2d 366, 369; *Barrera v. De La Torre* (1957) 48 Cal.2d 166.)

In any event, the statute provides that these matters are deemed excepted to if the party makes known its position "within a reasonable time." (Code Civ. Proc., § 647.) Truong's objection to the special verdict form after she lost the case, the jury was discharged, and judgment was entered was not within a reasonable time, particularly in light of her trial brief and jury instructions that led everyone to believe that she agreed with the verdict form's questions.

In a similar vein, Truong attempts to draw a distinction between an ambiguous verdict form, which requires an objection to preserve appellate review, and a verdict form that is legally erroneous, which she contends does not. The cases on which she relies for this point, however, pertain to jury instructions, not special verdict forms. (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7; *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 296-297.)

On the record before us, Truong cannot now challenge the inclusion of Question 2 in the special verdict form. Nonetheless, to complete our analysis, we will proceed to the merits of Truong's appeal.

B. *Verdict Form*

A cause of action for wrongful termination of employment in violation of public policy requires proof of the following: (1) the plaintiff was the employee of the defendant; (2) the plaintiff was terminated from her employment; (3) there was a nexus between the termination of employment and the employee's protected activity (such as actions protected by statute or the Constitution); (4) the termination was the legal cause of the plaintiff's damages; and (5) damages. (See *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426, fn. 8; cf. CACI No. 2430 [listing elements as: employer-employee relationship; employee was discharged or demoted; employee's whistleblowing (protected activity) was a "motivating reason" for the discharge or demotion; and the discharge or demotion caused harm]; see also CACI VF-2406 [standard verdict form including elements of CACI No. 2430].)

At issue here is the third element of the claim – the nexus between the termination of Truong's employment and her participation in a protected activity. Truong asserted that her protected activity was comprised of her complaints about safety violations, which allegedly were protected by Health and Safety Code section 1278.5 and Labor Code section 1102.5. These statutes were among those alleged in the second amended complaint as statutes underlying the claim, and they were the statutes asserted as the basis for the claim in the parties' trial briefs. In addition, Truong requested jury instructions which, without mentioning the code sections specifically, recited the substance of both statutes.[5]

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[5] Truong appears to suggest that she proceeded at trial only on the basis of Health and Safety Code section 1278.5, and not Labor Code section 1102.5. Similarly, in her motion for a new trial, Truong asserted: "In bringing her claim the plaintiff did not rely on Labor Code § 1102.5." That representation was inconsistent with Truong's allegations in the second amended complaint, her trial brief, and her proposed jury instructions. On the other hand, in her reply brief in support of her new trial motion, Truong contended that the trial court had prohibited her from proceeding at trial under Labor Code 1102.5, "the special instruction the plaintiff requested prior to trial based on Labor Code § 1102.5 was no longer necessary[,] and the court did not give the special instruction the plaintiff requested." Although the instruction based on Labor Code

Thus, Truong had to establish a nexus between her protected complaints of safety violations and the termination of her employment. (See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1258-1259.) Where, as here, there is evidence of *both* legitimate and illegitimate reasons for the termination, the plaintiff must show that an illegitimate reason (e.g. retaliation for whistleblowing) played a "motivating or substantial role," upon which the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same employment decision even without taking the illegitimate reason into account. (*Grant-Burton v. Covenant Care, Inc*. (2002) 99 Cal.App.4th 1361, 1379 (*Grant-Burton);* see *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Brothers*) ["[w]hen it appears that an employee was dismissed because of combined valid business reasons as well as for invalid reasons, such as union or other protected activities, the question becomes whether the discharge would not have occurred 'but for' the protected activity;" if protected activity is a motivating factor, the burden shifts to the employer to show that the discharge would have occurred anyway]; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1191 (*General Dynamics*) [employee's conduct must be "motivated by impermissible considerations under a 'but for' standard of causation"].)

Questions 1 and 2 in the special verdict form tracked the law as set forth in *Grant-Burton, Martori Brothers,* and *General Dynamics*. Question 1 asked: "Were plaintiff's complaints or reports of alleged violations *a motivating reason* for defendant's decision to discharge plaintiff?" (Italics added.) Question 2 asked: "Did defendant *prove* that the discharge *would have occurred for legitimate, independent reasons had plaintiff not engaged in the activities* in question number 1?" (Italics added.) The special verdict

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§ 1102.5 was included in the record as part of the jury instructions filed by the court, we cannot confirm what instructions were actually read to the jury, or what the attorneys argued to the jury, because the relevant portions of the reporter's transcript have not been included in the record on appeal. As shall be seen, the resolution of this question is not necessary to the resolution of the appeal.

form was therefore consistent with *Grant-Burton*'s statement of the law.[6] (*Grant-Burton, supra,* 99 Cal.App.4th at p. 1379.)

Truong argues the verdict form was nonetheless erroneous. She observes that the special verdict form in this case differed from the standard special verdict form set forth in CACI VF-2406: Question 1 in this case corresponded to a question on CACI VF-2406, but CACI VF-2406 does not have a question akin to Question 2 on the special verdict form. Instead, CACI VF-2406 proceeds directly to questions concerning causation and damages. However, this distinction does not mean the inclusion of Question 2 on the special verdict form was erroneous. The Directions for Use for CACI VF-2406 advise that the standard verdict form is only a model, and it might have to be modified depending on the circumstances of the case. Here, the evidence of Mercy Medical's mixed motives behind its employment decision could justify the inclusion of Question 2, in line with *Grant-Burton*.

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[6] Mercy Medical seeks to uphold the verdict using a slightly different approach, contending that Question 2 was based on an affirmative defense deriving from the language of Labor Code section 1102.5 and Health and Safety Code section 1278.5. Specifically, while Labor Code section 1102.5 prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency, Labor Code section 1102.6 provides: "[O]nce it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the *alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5*." (Italics added.) This language is similar to the language of Question 2. In addition, Health and Safety Code section 1278.5, subdivision (d)(1) creates a *rebuttable presumption* that discriminatory action was taken by the health facility in retaliation against an employee if the alleged discriminatory action occurred within 120 days of the filing of the grievance or complaint by the employee. One way for Mercy Medical to rebut the presumption would be to establish, as set forth in verdict Question 2, that the discharge would have occurred for a legitimate independent reason. We note, however, that Truong did not assert causes of action based on these statutes; rather, she cited these statutes to support her claim that she was violated in violation of public policy. We need not address this additional theory in resolving the appeal.

Truong also argues that the inclusion of Question 2 was erroneous because she won the case as soon as the jury indicated in its answer to Question 1 that retaliation was a motivating reason for her termination, and Question 2 should not have been included because it was irrelevant whether Mercy Medical also had legitimate reasons for firing her.

Surprisingly, Truong cites *Grant-Burton* for this proposition. The court in *Grant-Burton* ruled: "'Once the [employee] establishes . . . that an illegitimate factor played a motivating or substantial role in an employment decision, the burden falls to the [employer] to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.' [Citations.]" (*Grant-Burton, supra,* 99 Cal.App.4th at p. 1379.) This sentence confirms that an employer's good cause for the termination *can* preclude liability. The court continued: "Because Covenant Care has not established that it would have discharged Grant-Burton regardless of the discussion about bonuses, we cannot say that, *as a matter of law*, her discharge was for good cause." (*Ibid.*, italics added.) In other words, the court ruled that summary judgment for the defense was precluded because there was a triable factual issue as to good cause, not because good cause was legally unavailable to counter the plaintiff's claim.

Truong also relies on *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th317, 359 (*Guz*), and particularly its observation that the "ultimate issue" in a discrimination case is "whether the employer acted with *a motive to discriminate illegally*." (*Id*. at p. 358, italics in original.) From this, Truong contends the jury's finding that Mercy Medical was motivated by Truong's complaints in firing her entitles her to judgment.

The jury's verdict, however, must be viewed as a whole. Although the jury found that retaliation was a motivating reason for Truong's termination, it also found that Mercy Medical would have fired Truong *anyway*. From these two findings, it was reasonable for the court to conclude that Mercy Medical, in the final analysis, did *not* terminate Truong's employment with a motive to discriminate (or retaliate) illegally.

Lastly, we address Truong's primary argument. Truong contends that Question 2 was improper because it constituted a burden-shifting question for the court, not the jury. For this proposition, she relies on *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189 (*Caldwell*), a case she brought to the trial court's attention only after she lost on her new trial motion.

In *Caldwell*, the jury returned a special verdict in favor of the defendant on the plaintiff's race and age discrimination claims and found the plaintiff had breached his employment contract. (*Caldwell, supra,* 41 Cal.App.4th at p. 193.) On appeal, neither the special verdict form nor any claim for wrongful termination in violation of public policy was at issue. Instead, the issue on appeal pertained to the import at trial of the "shifting burdens of proof applicable to claims of 'disparate treatment' employment discrimination which rely on circumstantial evidence to prove discriminatory intent." (*Id*. at p. 195.)

The trial court in *Caldwell* had instructed the jury on the three phases of analysis for discrimination claims (see *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804 (*McDonnell Douglas*): initially, the plaintiff must carry the burden of establishing a prima facie case of racial discrimination; the burden then shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action; and then the burden shifts back to the plaintiff to show that the employer's stated reason was a pretext. (*Caldwell, supra,* 41 Cal.App.4th at pp. 196-198.) The appellate court held this instruction was erroneous, because whether the plaintiff had met his prima facie burden, and whether the employer had rebutted the prima facie showing with evidence of a nondiscriminatory reason, were questions of law for the trial court, not questions of fact for the jury. (*Id*. at p. 201.) "In short, if and when the case is submitted to the jury, the construct of the shifting burdens 'drops from the case,' and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race- or age-neutral reasons for the employment decision." (*Id*. at p. 204.) The court further explained that, by the time a case is submitted to a jury, the plaintiff has already established a prima facie case

and the employer has already proffered a nondiscriminatory reason, or otherwise the claim would have been resolved as a matter of law before trial. (*Id.* at pp. 203-204.) The jury decides only "the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision." (*Id.* at p. 205.)[7]

Based on *Caldwell*, Truong argues: "Once the case goes to the jury, the jury's sole focus issue is whether an illegal factor was a motivating reason for the employer's adverse employment action." Or, to put it another way, Question 1 was sufficient, and the addition of Question 2 was inappropriate for the jury even if it would have been germane to an analysis the court could employ.

Caldwell does not compel reversal in this case. In the first place, *Caldwell* addressed a discrimination claim, not a claim for wrongful termination in violation of public policy. This distinction might be significant.[8] But even assuming the concept underlying *Caldwell* applied to claims for wrongful termination in violation of public

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[7] *Caldwell*'s determination that the jury should not consider a burden-shifting analysis appears inconsistent with our Supreme Court's statement – five years later – that a plaintiff must establish a prima facie case "at trial" and, "at this trial stage, the burden shifts to the employer" and then back to the plaintiff. (*Guz, supra,* 24 Cal.4th at pp. 355-356.)

[8] To avoid liability for wrongful termination in violation of public policy, the employer must *prove by a preponderance of the evidence* that it would have made the same employment decision without taking into account the illegitimate reasons. (*Grant-Burton, supra,* 99 Cal.App.4th at p. 1379.) As so worded in *Grant-Burton,* this requirement appears more like an affirmative defense, as compared to the employer's obligation in a discrimination case under *McDonnell Douglas,* by which the employer must merely produce *evidence* of a legitimate non-discriminatory reason to rebut the plaintiff's prima facie case and force the plaintiff to prove the employer's pretext. Whether this makes *Caldwell* inapplicable to claims for wrongful termination in violation of public policy is a question we need not and do not decide. Nor need we decide the remaining persuasiveness of *Caldwell* in light of *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1452-1453 – decided seven years after *Caldwell* – which applied the three-tier burden shifting analysis to a retaliatory discharge claim in reviewing a judgment that was based on a jury's verdict form, which had inquired whether the plaintiff's protected activity was a "motivating factor" and the employer would not have taken the same adverse actions "in the absence of the unlawful motive."

policy, it addresses only how a jury should be instructed, not the appropriate content of a special verdict form. This distinction is significant indeed.

Jury instructions and special verdict forms fill different roles. Jury instructions tell the jury how it should approach its task in deciding the case, including the law to which the jury must apply the facts as it finds them. In part because jurors cannot decide *legal* questions, the court in *Caldwell* found it inappropriate to instruct the jury to decide whether a prima facie case was established, whether the burden of producing evidence had been met, and whether burdens had been shifted. By contrast, a special verdict form is merely a means by which the jury records findings of *fact* pertaining to the elements of a claim, leaving the court with the responsibility of entering a verdict based on those factual findings. (Code Civ. Proc. § 624.) While *Caldwell* found it impermissible to instruct the jury to resolve questions of law, there is nothing inappropriate under *Caldwell* about giving the jury a special verdict form to record their findings of fact.[9]

Truong's reliance on *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735 (*Heard*) is also misplaced, for the same reason. She quotes from the following sentence in *Heard*: "Finally, we also note that the confused state of the jury instructions and special verdict could have been avoided if the parties had realized that the *McDonnell Douglas* framework is a burden shifting tool – not a subject on which the jury should be *instructed*." (*Id*. at pp. 1758-1759, italics added.) In the same paragraph, the court observed that "neither party raises the issue on appeal, and . . . both parties agreed below that the jury should be instructed on the *McDonnell Douglas* framework." (*Id*. at p. 1759.) Reversing the judgment on other grounds, the court observed that upon retrial "the parties can avoid the problems presented here by recognizing that the jury should never have been *instructed* on the elements of Heard's prima facie case." (*Ibid*., italics added.) The court in *Heard* did not state that the special verdict form was erroneous, but merely that the *McDonnell Douglas* framework was "not a subject on which the jury should be *instructed*." (*Ibid*., italics added.)

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[9] As mentioned, although a jury instruction in this case followed the same format and substance as the special verdict form, Truong does not challenge the jury instruction.

Because of the distinction between jury instructions and a special verdict form, the question comes down to whether the court, in entering judgment, erred based on the jury's factual findings. (See *All-West, supra*, 183 Cal.App.3d at p. 1223 [verdict should be interpreted so as to uphold it and give it the effect intended by the jury, consistent with the law and the evidence].) The jury plainly found that part of Mercy Medical's reason for the termination was retaliation (Question1), but that Mercy Medical would have terminated Truong for legitimate reasons anyway (Question 2). Based on *Grant-Burton*, the trial court was correct in entering judgment for Mercy Medical in light of these findings. (*Grant-Burton, supra*, 99 Cal.App.4th at p. 1379.) And even if the ultimate task was to determine only whether retaliation was a motivating reason for Mercy Medical's employment decision, that question could well be answered by the court in the negative given the jury's conclusion that Mercy Medical would have terminated Truong *anyway, without regard to her complaints*. Given the jury's answer on Question 2, the jury could not have meant what Truong claims it meant in answering Question 1.

In the final analysis, on the grounds of invited error, waiver, lack of error, and harmless error, Truong fails to establish that reversal of the judgment is required.

III. *DISPOSITION*

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.*

* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.